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No. 88-437

In the Supreme Court of the United States

OCTOBER TERM, 1988

TAYLOR LAWRENCE, d/b/a GRIZZLY AND DALEY RANCH, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in an area characterized by a checkerboard pattern of federal and non-federal ownership of alternating sections of land, a fence constructed entirely on the non-federal sections violates the Unlawful Inclosures of Public Lands Act, 43 U.S.C. 1061 *et seq.*, because it encloses about 9,600 acres of federal land and obstructs the free passage of pronghorn antelope over the federal land.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. xvii-xxxviii) is reported at 848 F.2d 1502. The opinion of the district court (Pet. App. i-xvi) is reported at 620 F. Supp. 1414.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1988. A petition for a writ of certiorari was timely filed on September 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1 of the Unlawful Inclosures of Public Lands Act of 1885 (UIA), 43 U.S.C. 1061, makes unlawful all enclosures of any public land by any person without color of title to all the public land within the enclosure. Section 3 of the UIA, 43 U.S.C. 1063, makes it unlawful for any person, by force, threats, intimidation, fencing, enclosing or other unlawful means: (1) to prevent or obstruct any person from establishing a settlement under the public land laws or (2) to prevent or obstruct free passage or transit over or through public lands. The presence of an enclosure is therefore not essential to a violation of the UIA since the actions prohibited in Section 3 can be accomplished with or without an enclosure. As applied to fences on private land but enclosing public land, this Act is a lawful exercise of the constitutional power of the United States to abate a nuisance. *Camfield* v. *United States*, 167 U.S. 518, 525 (1897).

2. Petitioner Lawrence constructed a twenty-eight mile fence enclosing more than 20,000 acres of land near Rawlings, Wyoming (Pet. App. iii). The enclosed land is located in the checkerboard configuration of federal and non-federal ownership which is the legacy of the Union Pacific Railroad Act of July 1, 1862, ch. 120, 12 Stat. 489, §§ 3-4, 12 Stat. 492, as amended by Act of July 2, 1864, ch. 216, 13 Stat. 356, § 4, 13 Stat. 358. Under that Act, the railroad was patented a certain number of odd-numbered sections of land for each mile of track it laid while the even-numbered sections were reserved by the United States (Pet. App. iii-iv). Lawrence owns or has permission to occupy the odd-numbered sections within his fence (*id.* at iv). The even-numbered sec-

tions are in state or federal ownership (*ibid.*). About 9,600 acres enclosed by Lawrence's fence are federal land on which he holds permits to graze cattle for 60 days during each year (*id.* at xix).

Lawrence's fence is built entirely on private sections of land, except where it crosses common corners of state and federal land (Pet. App. xix). Lawrence's fence is not a Bureau of Land Management (BLM) approved fence[1] (*id.* at iv). It is about five feet high and made of woven wire with no gap at the bottom and is topped with barbed wire. It is designed to be antelope-proof[2] (*id.* at iv, xii). The fence is broken by 28 gates, 19 of which are unlocked; and at various locations "No Trespassing" signs are posted (*id.* at xii, xxxv n.13).

3. Within Lawrence's fence is an important geographic uplift known as Red Rim. This area contains an abundance of Wyoming big sagebrush which constitutes the major part of the diet of pronghorn antelope during the winter months. In addition, the uplifted area catches winds during the winter that expose the sagebrush in this area for the antelope when other areas are snow-covered. Portions of Red Rim have been declared by the Wyoming Game and Fish Department to be critical winter habitat for the pronghorn antelope herd in the Baggs, Wyoming

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[1] A fence built on public land would have to be approved by the BLM (see 43 U.S.C. 315c). An approved fence would be designed to allow antelope to crawl under it or jump over it (Pet. App. xx n.4).

[2] This fence was built ostensively to protect a crested wheat crop which Lawrence claimed he intended to plant (see Pet. 6). However, Lawrence has never planted crested wheat on the enclosed land (Pet. App. xiv).

area. The antelope have no alternative winter feeding ground. *Id.* at iii.

The winter of 1983-84 was unusually severe and the antelopes' access to the winter range in Red Rim was blocked by Lawrence's recently completed antelope-proof fence. Unable to negotiate this fence, the antelope collected along it and starved in their attempt to reach the critical winter range in Red Rim. *Id.* at xix.

To alleviate this situation, the Wyoming Department of Game and Fish, the Wyoming Wildlife Federation and the National Wildlife Federation (Wildlife Federations), and the Governor of Wyoming received permission from Lawrence to remove eight miles of his fence at the expense of the Department of Game and Fish. The fence was replaced in the spring, again at the expense of the Department of Game and Fish. This same process of removing, and then replacing, a portion of fence at the expense of the Department of Game and Fish to allow access by the antelope to this critical winter habitat was repeated the following winter of 1984-85. Stipulation of Material Facts, ¶ 18, attached as Docketing Statement (10th Cir.), Exh. B.

4. On April 11, 1985, the United States filed a complaint against Lawrence seeking a declaration that Lawrence's fence is an unlawful enclosure within the meaning of the UIA and an injunction compelling the removal or modification of the fence so as to allow unobstructed access for pronghorn antelope and the public to the public lands enclosed by the fence. The Wildlife Federations later intervened as party plaintiffs. Motion to Intervene filed April 25, 1985; Order of May 17, 1985.

Following a hearing on a motion for a preliminary injunction filed by the Wildlife Federations which was consolidated into a full hearing on the merits (Pet. App. ii), the district court orally granted the injunction on October 29, 1985. It ordered (*id.* at ii-iii) Lawrence to remove within ten days the portions of his fence which in the past two winters had been let down and to remove or modify to conform to BLM standards within sixty days all 28 miles of his fence. The court confirmed and further explained its order in written form on November 1, 1985, holding (*id.* at iv-vi) the case to be controlled by this Court's decision in *Camfield* v. *United States*, 167 U.S. 518 (1897). This Court there ruled that a fence surrounding a checkerboard area of publicly- and privately-owned land violated the UIA. The district court noted (Pet. App. v) that the *Camfield* fence, like Lawrence's, was built entirely on private sections but enclosed public land.

The court of appeals affirmed. It held (Pet. App. xxiv-xxxii) that the UIA prohibits the enclosure of public land (43 U.S.C. 1061) and the obstruction of access over public land necessary for any lawful purpose (43 U.S.C. 1063), including the management of federally-protected antelope, and rejected (Pet. App. xxxv-xxxvi) Lawrence's argument that the presence of gates prevented his fence from being an unlawful enclosure. The court distinguished (*id.* at xxiii) *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979), in which the United States had claimed that it had reserved an easement over the privately-owned sections of land in a checkerboard area, on the ground that the present case involved simply the question whether the fence constructed by Lawrence unlawfully enclosed public land in violation of Sections 1 (43

U.S.C. 1061) and 3 (43 U.S.C. 1063) of the UIA. Like the district court, the court of appeals noted (Pet. App. xx-xxv) that the government's power to abate such a nuisance had been settled by *Camfield* in a case strikingly similar to the present one. The court also held (*id.* at xxvi-xxvii) that nothing of Lawrence's had been "taken," and noted (*id.* at xxvii-xxviii) that he retained the right to exclude antelope from his land if he could do so without unlawfully enclosing public land. Finally, the court rejected Lawrence's claim, in its various forms, that the passage of the Taylor Grazing Act, 43 U.S.C. (& Supp. III) 315 *et seq.*, distinguished his case from *Camfield*. Specifically, the court ruled that his Taylor Grazing permits did not give him color of title under the UIA (Pet. App. xxxii-xxxiii), and that his fence was an unlawful enclosure under the UIA even though it did not violate the terms of his Taylor Grazing Act lease since it is built on private, rather than leased, land (*id.* at xxxiii).

ARGUMENT

The decision below is a correct and straightforward application of this Court's holding in *Camfield* v. *United States*, 167 U.S. 518 (1897). It does not conflict with any decision of this Court or any court of appeals. Accordingly, review by this Court is not warranted.

1. The court of appeals correctly ruled that *Camfield* is controlling here. *Camfield*, like this case, arose because the defendants had fenced in an area of land characterized by the checkerboard public/private ownership that resulted from the Union Pacific Railroad Act land grants. Like Lawrence's fence, the fence in *Camfield* was built entirely on the

privately-owned odd-numbered sections of land in the checkerboard. And, like Lawrence's fence, the *Camfield* fence enclosed not only the private land but also thousands of acres of public land. At each section line, a swinging gate had been placed to provide "access" to the enclosed public domain land. The defendants denied any intention to monopolize the public land or to exclude the public. In addition, the defendants claimed that the fence was needed to carry out an irrigation project on the private land in the enclosure. *Camfield*, 167 U.S. at 519-521. This Court held (*id.* at 522) that the enclosure violated Section 1 of the UIA, which makes unlawful all enclosures of any public land by any person without a good faith claim or color of title to the public land enclosed. Despite the defendants' ownership of all the odd-numbered sections which were also enclosed, the claimed need for the fence, the presence of gates at each section or the disclaimer of any intention to exclude the public, the Court concluded (167 U.S. at 522) that defendants were "certainly within the letter of * * * [the UIA since] [t]hey did enclose public lands of the United States." It was sufficient under the UIA that public land had been enclosed by someone without claim or color of title.

The courts below found the facts here to be "virtually identical" to those in *Camfield* (see Pet. App. vi (district court), xix n.1, xxii (court of appeals, quoting and adopting findings of district court)). Petitioner does not challenge any findings of fact as clearly erroneous.[3] Rather, petitioner argues that

[3] Nor does petitioner press his argument, made in the courts below, that he has not violated the UIA because he has a good faith claim or color of title to the enclosed public lands in that he holds leases under the Taylor Grazing Act

this Court's subsequent decision in *Leo Sheep* v. *United States*, *supra*, modifies the applicability of the UIA to this situation as established in *Camfield*. That contention is refuted by the Court's opinion in *Leo Sheep* itself, which specifically stated (440 U.S. at 683) that "the Unlawful Inclosures of Public Lands Act of 1885 [is not] of any significance in this controversy."

The issue before the Court in *Leo Sheep* was whether the United States had reserved an easement that it could use to build a public road over the privately-owned sections of land in a checkerboard area. The Court found that the United States had not reserved such an easement; thus compensation was due the private landowners. The Court's holding that the government could not take private land without compensation is irrelevant to this case, which, like *Camfield*, concerns the obstruction of public lands by an unlawful enclosure.[4]

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allowing him to graze cattle there for 60 days per year. Insofar as he makes reference (see Pet. 15) to such a claim, however, it is insubstantial. As the courts below stated (Pet. App. xi, xxxii-xxxiii), the language of the Taylor Grazing Act itself negates petitioner's claim. See 43 U.S.C. 315b ("[T]he issuance of a [grazing] permit * * * shall not create any right, title, interest, or estate in or to the lands."). Further, the case law has consistently interpreted the good faith exception to the UIA to refer to claims of fee, rather than leasehold, title. See, *e.g.*, *Smith* v. *Third Nat'l Exchange Bank*, 244 U.S. 184 (1917); *Cameron* v. *United States*, 148 U.S. 301 (1893).

[4] There is no basis for petitioner's suggestion that *Camfield* is no longer good law (Pet. 22-23) and that the UIA is no longer operative (Pet. 18-19) because each belonged to an era when lands were open to settlement and common grazing. Congress did not limit its statutory prohibition of unlawful enclosures to those that interfere with settlement or grazing

2. Lawrence also argues (Pet. 15-22) that the court of appeals erred in finding that the UIA prohibits obstructions to the passage of antelope as well as people. He adds (Pet. 17) that, even if antelope are protected, his fence had gates in it and so cannot violate Section 3 of the UIA. His contentions are not supported by either the plain language of the statute or the case law.

Section 1 of the UIA, to which petitioner makes no reference, very broadly prohibits all enclosures of public lands without reference to what is fenced out of those public lands or to whether the enclosures have gates:

> All inclosures of any public lands * * * constructed by any person * * * to any of which land included within the inclosure the person

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rights, although protecting those rights was clearly a focus of the UIA (see *Leo Sheep*, 440 U.S. at 683-684). Rather, Congress declared "[*a*]*ll* inclosures of any public lands * * * unlawful" (43 U.S.C. 1061 (emphasis added)). Nor does petitioner cite any legislative history to support the claim that the statute effected a narrower prohibition than its language indicates. As the court of appeals held (Pet. App. xxx), there is no reason to read extraneous restrictions into the statute when the language of the statute is clear on its face. See *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (language of statute ordinarily conclusive, absent clear legislative intent to contrary). In addition, Congress amended the UIA as recently as 1984 (see Act of Nov. 8, 1984, Pub. L. No. 98-620, Tit. IV, § 402(43), 98 Stat. 3360), which it would not have done had the repeal of the last homesteading acts in 1976 by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Tit. VIII, § 702, 90 Stat. 2787-2789, or the termination of open public range in 1934 by the Taylor Grazing Act, ch. 865, 48 Stat. 1269-1275, implicitly repealed the UIA.

> * * * had no claim or color of title made or acquired in good faith * * * are declared to be unlawful * * * .

43 U.S.C. 1061. The court of appeals rightly concluded (Pet. App. xxx) that petitioner's fence is clearly an "inclosure[] of any public lands * * * declared to be unlawful" by Section 1.

Petitioner eschews Section 1 to rest his claim entirely on Section 3 of the UIA (43 U.S.C. 1063). That section adds to the fencing prohibition in Section 1. It prohibits: (1) the prevention or obstruction by any means of any person from entering on public land subject to settlement or entry; and (2) the prevention or obstruction by any means of "free passage or transit over or through the public lands" (43 U.S.C. 1063). The court of appeals correctly concluded (Pet. App. xxx-xxxii, xxxv-xxxvi) that, despite the presence of gates, petitioner's fence is unlawful under this section as well because it "prevent[s] or obstruct[s] free passage or transit over or through the public lands" of federally-protected wildlife. The fact that the first clause of Section 3 speaks of preventing entry by "people" for purposes of settlement or entry under public land laws does nothing to limit the applicability of the second clause in Section 3 to the "passage or transit" of "people" only, just as it does nothing to remove the general prohibition of Section 1. The plain and broad language of Section 1 and the second clause of Section 3 should not be restricted absent clear legislative intent to do so. See *North Dakota* v. *United States*, 460 U.S. 300, 312 (1983).[5]

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[5] Petitioner objects that the court of appeals' holding amounts to the seizure of private property for antelope (Pet.

The Tenth Circuit's holding accords with previous decisions. In *Camfield*, this Court interpreted Section 1 of the UIA to prohibit an unlawful enclosure without indicating that only enclosures infringing grazing or other specific rights would trigger the statute. Rather, the Court stated (*Camfield*, 167 U.S. at 526) more comprehensively that Congress has the power of legislating against a nuisance "for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection."

22-23), results in a drastic modification of property management (Pet. 19-20), and imposes a servitude upon patented private lands for the benefit of antelope (Pet. 22). These are merely variations of the argument that *Leo Sheep* should control this case. As the court of appeals correctly explained, "the district court did not grant the antelope any easement across Lawrence's private land, nor do we. That question is simply not at issue here. Instead, the issue in this case is merely whether the fence constructed and maintained by Lawrence unlawfully encloses federal law [*sic*]" (Pet. App. xxii-xxiii).

The power of the United States to abate the nuisance represented by a fence built on private land but surrounding public land was settled in *Camfield*. As the Court concluded there:

> The defendants were bound to know that the sections they purchased of the railway company could only be used by them in subordination to the right of the Government to dispose of the alternate sections as it seemed best, regardless of any inconvenience or loss to them, and were bound to avoid obstructing or embarrassing it in such disposition. * * *

Camfield, 167 U.S. at 527. In short, while Lawrence may fence his own land to exclude antelope if he wishes (see *Camfield*, 167 U.S. at 528), the UIA provides that he may not

Indeed, in *Stoddard* v. *United States*, 214 F. 566 (1914), the Eighth Circuit interpreted Section 3 of the UIA to preserve not only the "free passage or transit" of people over public land but also that of cattle. Specifically rejecting the argument that Section 3 applies only to protect the passage of people, the *Stoddard* court held that the UIA was intended "to prevent the obstruction of free passage or transit for *any and all* lawful purposes over public land." *Stoddard*, 214 F. at 568-569 (emphasis added); see also *MacKay* v. *Uinta Development Co.*, 219 F. 116, 118-120 (8th Cir. 1914). The court of appeals here followed *Stoddard*, properly finding the management of public lands to provide forage for antelope a "lawful purpose." [6] The court in *Stoddard* also found (214 F. at 568) that the presence of gaps in the fence there did not cure the UIA violation, since the cattle could not pass through the gaps because of natural barriers. Likewise here, the court correctly found that the presence of gates could not cure the obstruction to antelope presented by the fence.[7]

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fence his land so as to effect an enclosure of the public lands. As the court of appeals noted (Pet. App. xxviii), "[a]ll that Lawrence has lost is the right to exclude others, including wildlife, from the public domain—a right he never had."

[6] The court of appeals found (Pet. App. xxxi-xxxii) the management of land to provide winter forage for antelope to be a lawful purpose of public lands by looking to the directive in the Federal Land Policy and Management Act that requires that "the public lands be managed in a manner * * * that will provide food and habitat for fish and wildlife and domestic animals" (43 U.S.C. 1701(a)(8)).

[7] *Golconda Cattle Co.* v. *United States*, 214 F. 903 (9th Cir. 1914) and *United States* v. *Johnston*, 172 F. 635 (C.C.

3. Petitioner further claims (Pet. 10-11) that the court of appeals held that the intent with which a fence is built is irrelevant to a UIA violation and that this holding is inconsistent with *Camfield*, insofar as it applies, and with Ninth Circuit case law.

The court of appeals' decision, however, did not rest on a holding that intent is irrelevant to a UIA violation. Rather, the district court in this case found (Pet. App. xiv) that both the *effect* and *intent* of the fence was to exclude antelope, a factual finding found (*id.* at xxix n.8) not clearly erroneous. Thus, the court of appeals concluded (*ibid.*): "whether Lawrence's intent in building the fence is relevant or not, the fence is unlawful under the UIA." Accordingly, the question whether intent is relevant to a UIA violation is not presented by this case.[8]

N.D. Cal. 1908), cited by petitioner (Pet. 17), do not cut to the contrary. In each case, the court simply found that the presence of long gaps in the fence at issue meant that the fence was not an "inclosure" for purposes of the Act. See *Golconda*, 214 F. at 909 (gaps from 90-3400 feet); *Johnston*, 172 F. at 636 (gaps of one-half to one mile).

[8] Moreover, the 1914 Ninth Circuit case cited by petitioner, *Golconda* v. *United States*, *supra*, does not, in any event, stand for the proposition that intent is a necessary element of a UIA violation. Rather, the court in *Golconda* held (214 F. at 904-905) merely that the existence of an intent to enclose public lands could be considered in the court's factual determination whether a particular fence was, in fact, an "inclosure" at all for purposes of the UIA. The court in *Golconda* correctly read (*id.* at 904) *Camfield* to consider a defendant's intent to the extent that intent helped to distinguish fences on private land that enclosed that land alone from those that enclosed public land or interfered with access to it. Cf. *Camfield*, 167 U.S. at 522 (finding defendants "within the letter of [the UIA]" without requiring in-

4. Petitioner also errs in contending (Pet. 14-15) that even if *Camfield* controls, the court of appeals has departed from *Camfield* in upholding the district court's order requiring modification of his fence to comply with BLM standards or removal of all 28 miles of his fence.

In *Camfield*, the district court ordered abatement of the nuisance created by defendants' fence by requiring removal of the entire fence. Brief of *Camfield* Appellants before the United States Supreme Court at 7, quoting from the district court decree, reproduced in Intervenor Wildlife Federation's Addendum B-13, B-16. The court of appeals here has affirmed the same remedy sanctioned in *Camfield*.

Moreover, under the UIA, the action required to abate a nuisance lies within the discretion of the district court (see 43 U.S.C. 1062). Because the fence constituted a prohibited enclosure, ordering modification or removal of the entire fence was well within the discretion of the district court, as *Camfield* demonstrates.[9]

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tent as element of offense where defendants "did enclose public lands * * * and there is nothing tending to show that they had any claim or color of title to the same, or any asserted right thereto under a claim made in good faith * * *.") Considering the existence of intent to enclose land is thus a permissible approach, not a mandatory one. It is possible that the court in an even earlier Ninth Circuit case (*Potts* v. *United States*, 114 F. 52 (1902)) considered intent a mandatory element of a UIA violation, although it appeared to limit its holding to its facts (see *id.* at 55). In any event, the Ninth Circuit assumedly rests with its later conclusion. In either case, any conflict obviously occurs so infrequently that it does not warrant this Court's attention.

[9] Lawrence's contention (Pet. 14) that the district court is without authority to order removal of the fence that borders

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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or "incloses" his own land or state-owned land which he leases ignores the fact that such a fence was *not* the enclosure litigated before the district court.

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